United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2048

To be argued By:
Michael C. Devine

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

COMPETITIVE ASSOCIATES, INC.,

Appellant,

vs.

LAVENTHOL, KREKSTEIN, HORWATH & HORWATH,
MORTON DEAR, ROBERT BIER and THOMAS MARTINO,

Appellees,

On Appeal from the United States District Court
for the Southern District of New York.

BRIEF FOR APPELLANT
COMPETITIVE ASSOCIATES, INC.

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Re: Competitive Associates v.
Laventhol, Krekstein, Horwath & Horwarth; 74 - 2048

To: Court of Appeals, Second Circuit;
All Counsel

We note that in appellant's brief we have spelled "adviser" with an "e" in some places, and with an "o" in others. Although both apparently are correct, we apologize for the oversight.

BUTOWSKY, SCHWENKE & DEVINE

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ISSUES PRESENTED FOR REVIEW

1. Can plaintiff satisfy the causation-in-fact element of its prima facie case without proving that it saw the false and misleading financial statements of Takara Partners which had been certified by the accounting defendants?

2. Does a triable issue of fact exist as to whether plaintiff saw the false and misleading financial statements of Takara Partners which had been certified by the accounting defendants?

3. Does a triable issue of fact exist as to whether the deceptive practices of Yamada and the accounting defendants touched those purchases and sales of securities which were made by plaintiff at Yamada's direction?

STATEMENT OF THE CASE

A. The Nature of the Case.

Plaintiff Competitive Associates, a publicly owned mutual fund, lost several million dollars as a result of purchases and sales of securities which its advisor, one Akiyoshi Yamada, unlawfully caused it to make. It here sues Yamada, Yamada's company (Takara Asset Management Corp.), Yamada's attorney (Ira M. Smith), Yamada's accountants (Laventhol, Krekstein, Horwath and Horwath ("Laventhol, Krekstein")), and the responsible employees of Laventhol, Krekstein (Morton Dear, Robert E. Bier, and Thomas Martino, Jr.). Those portions of the suit which are against Laventhol, Krekstein and their employees (the "accounting defendants") are based upon section 10(b) of the Securities Exchange Act of 1934 ("1934 Act"), SEC Rule 10(b)-5 thereunder, section 17(a) of the Securities Act of 1933 ("1933 Act"), sections 206(1) and 206(2) of the Investment Advisors Act, common law fraud, and breach of fiduciary obligation. Plaintiff seeks money damages.

B. The Course of Proceedings and Disposition Below.

After issue had been joined, but prior to the conclusion of deposition discovery, the accounting defendants (excepting Bier) moved for summary judgment dismissing the complaint as to them (48a; 86a).* By opinion

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* References are to pages of the Appendix unless otherwise indicated.

and order dated June 26, 1974, the district court granted the motions, and on its own motion, granted summary judgment in favor of Bier as well (188a). On July 3, 1974, judgment was entered in accordance with the order (203a). Plaintiff Competitive Associates appeals from the order and the judgment (205a).

STATEMENT OF THE FACTS

Plaintiff Competitive Associates is a mutual fund, owned by public shareholders.

During 1970 Competitive Capital Corp. was the fund manager for Competitive Associates; however, it did not make the investment decisions for the fund. They were made by independent portfolio managers, who were retained by three-party agreement with the fund and the fund manager. The retention of portfolio managers was ratified by the fund's shareholders.

On October 9, 1970, Competitive Associates retained defendant Yamada, and his company, Takara Asset Management Corp., as one of the Fund's portfolio managers. The retention was ratified by the shareholders of Competitive Associates on the same day.

Yamada was terminated as a portfolio manager in May 1971 (183a). In his short tenure Yamada caused Competitive Associates to enter into securities transactions

which ultimately produced actual losses of approximately $5,000,000 (17a; 42a). In these transactions Competitive Associates was defrauded by Yamada, the issuers of certain of the securities purchased, and by certain broker-dealers.

Prior to his retention Yamada's credentials were investigated by Competitive Associates (139a-141a). Jerome Randolph, then president of the fund manager, conducted the bulk of the investigation (139a-147a). In addition, at least two of Competitive Associate's directors at the time had some knowledge of Yamada's background (94a).

As part of his investigation, Randolph interviewed people in the securities industry and at least one limited partner of Takara Partners, a so-called "hedge-fund" or investment limited partnership. Yamada was the general partner of Takara Partners, and the investment performance of that partnership generally was regarded as the primary measure of Yamada's expertise as an investment adviser (143a-148a; 161a-162a; 96a). Among the limited partners of Takara Partners were a number of people known to be reputable, wealthy, sophisticated investors, such as Keith Funston, former President of the New York Stock Exchange, J. Richardson Dilworth, and John L. Burns (96a-99a).

Following his investigation Randolph reported to the board of directors of Competitive Associates that Yamada was highly recommended as an adviser with a successful

record and promising future.

In 1969, and in 1970, the year in which Competitive Associates was investigating Yamada's credentials, the financial statements of Takara Partners were audited by Laventhol, Krekstein (67a-81a). The statements for the period ended December 31, 1969, certified by Laventhol, Krekstein, were materially false and misleading with respect to the size and quality of the partnership's net assets and its profit or loss performance (13a-15a; 100a-103a). If these statements had been correct, and if they had disclosed the true (and very negative) performance of the partnership, Takara Partners would not have retained its blue-ribbon membership and Yamada would have been regarded as an investment advisory failure. Thus but for the acts and omissions of the accounting defendants Yamada would not have been retained by Competitive Associates, nor ratified by its shareholders. In addition had the accounting defendants made the necessary disclosures in the later months of 1970 or early months of 1971 Competitive Associates would have terminated the advisory contract immediately.

POINT I

PLAINTIFF MUST PROVE THAT ITS DAMAGES WERE CAUSED IN-FACT BY THE ACTS AND OMISSIONS OF THE ACCOUNTING DEFENDANTS; BUT IT NEED NOT PROVE THAT IT SAW THE FINANCIAL STATEMENTS CERTIFIED BY THOSE DEFENDANTS

Although the opinion below does not discuss it, and indeed implicitly assumes the contrary, "reliance" is not a necessary element of plaintiff's prima facie case under §10(b) of the 1934 Act, §17 of the 1933 Act, or §206 of the Investment Advisors Act. It has been replaced (at least in cases like the present where the fraud consists of failure to disclose material information) by the concept of "causation-in-fact".*

In Affiliated Ute Citizens v. U.S., 406 U.S. 128 (1972) plaintiffs sold securities to unknown third parties

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* To some extent the district court also seems to have disinterred a "privity" requirement, concluding that only those for whom the false and misleading statements were prepared could have a cause of action against the accountants (199a). Whether this conclusion is a throwback to "privity" or to the so-called "primary beneficiary" rule of common-law cases like Ultramares v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931), it is not the law today, particularly under the federal securities laws.

through a bank. The bank employees were not found to have made any misrepresentations. However, the Supreme Court held them liable under §10(b) of the 1934 Act for failing to disclose information regarding the market price of the stock. Proof of reliance was held to be unnecessary.

> Under the circumstances of this case involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision. [citations omitted] This obligation to disclose and this withholding of a material fact establish the requisite element of causation in fact. (pp. 153-154).

See also Shapiro v. Merrill Lynch Pierce Fenner & Smith, 495 F.2d 228 (2d Cir. 1974), in which this Court held that, even on the basis of pre-Affiliated Ute decisions, it is not necessary for plaintiff to prove that non-disclosure of material facts induced plaintiff's purchases. Plaintiff need only allege that it would not have acted had it known of the information withheld by defendants (p. 240).

The court below found that Competitive Associates, if permitted a trial, would not be able to prove that it saw or directly relied upon the false and misleading financial statements, and that absent such proof it could not make a prima facie case. This is error, for it requires proof of direct reliance. Plainly plaintiff may prove causation-in-fact without showing that it saw or directly relied upon the

financial statements.

Causation-in fact, or "but-for" causation as it is sometimes known, is a mature common-law concept. Plaintiff Competitive Associates must prove that its injury resulted from an identifiable chain of events set in motion by the acts or omissions of the accounting defendants, and that the events were a reasonably foreseeable result of such acts or omissions. Stated another way, defendants' conduct must have been a substantial factor in bringing about the harm to plaintiff. Restatement 2d, Torts, §431.

The accounting defendants knowingly, and with an intent to defraud, certified materially false and misleading financial statements for a hedge fund in which members of the public then were investors, and in which the accounting defendants knew other members of the public were invited to invest. They knew they were facilitating, aiding, and abetting Yamada's scheme to swindle the investing public. Indeed it has been alleged that the accounting defendants accepted pay-offs from Yamada for their collusion (Bolger v. Laventhol, Krekstein, Horwath & Horwath, ___ F.Supp ___ (SDNY 1974), CCH Fed. Sec. L. Rep. ¶94,618 and ¶94,739). The means of the conspiracy in which the false financial statements were employed were to inflate Yamada's reputation and to attract a show-case of investors. Yamada's association with these prominent names was designed to give him an aura

of integrity and investment advisory success. The goal of the conspiracy was the enticement of public investors and the creation of a dumping ground for securities being manipulated by Yamada. The goal was accomplished when Competitive Associates retained Yamada.*

The duty of the accounting defendants to disclose the true financial condition and performance of Yamada's hedge fund, as well as their duty to disclose that they had accepted pay-offs for certifying false statements, continued throughout the period from May, 1970 through at least May, 1971. Plaintiff Competitive Associates was used by Yamada as a securities dumping ground particularly in the early months of 1971. Had the accounting defendants fulfilled their duty of disclosure Competitive Associates would have terminated the advisory contract and prevented all, or a substantial portion, of its losses.

Thus the chain of events flowing from certification of the false financial statements, as well as from the continuing failure of the accounting defendants to make necessary disclosures, led directly to plaintiff's damages. This chain of events was more than foreseeable; it was the particular goal of the whole scheme and conspiracy; it was

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* The district court accepted these facts as true, as it must have, because they present triable issues.

the intended result.

In Hochfelde . Ernst & Ernst, ___ F.2d ___ (7th Cir. 1974) CCH Fed. Sec. L. Rep. ¶94,781, accountants were sued under §10(b) of the 1934 Act for negligent auditing of financial statements of a securities broker-dealer. As in the present case, the gravamen of the complaint was that the accountants failed to disclose deficiencies in the statements. The lower court granted summary judgment for the accountants, but the Court of Appeals reversed. Causation and the scope of the accountants' duty were two of the main issues. It was held that under §10(b) of the 1934 Act the accountants owed a duty to plaintiff, who was a customer of the broker-dealer, although there was no showing that plaintiff had seen the audited financial statements. The court said that the dominant concern evidenced by the whole of the securities acts is that those comprising the investing public be adequately safe-guarded in their financial dealings with security brokers.

Hochfelder is a striking decision because it held accountants liable to the whole of the investing public for negligent misrepresentation. On the present appeal plaintiff does not ask for a holding that stringent. In this Circuit "scienter" must, and will, be proved. Therefore, accountants will be held to expansive liability only upon

a showing of fraud, not negligence alone.

On the causation issue, despite the accountants' claim that plaintiff's theory of causation rested on "utter speculation", the Hochfelder court held that this was "a matter properly left to full evidentiary development at trial and not disposable on a motion for summary judgment". And so it is in this case as well.

POINT II

A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER PLAINTIFF SAW OR DIRECTLY RELIED UPON THE FALSE AND MISLEADING FINANCIAL STATEMENTS CERTIFIED BY THE ACCOUNTING DEFENDANTS

A. The standards applicable to summary judgment motions.

It repeatedly has been held that in deciding a summary judgment motion the trial court is to find fact issues, not determine them. American Mfg. Mutual Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., 388 F.2d 272 (2d Cir. 1967). Moreover, the court must resolve all ambiguities and draw all reasonable inferences favorable to the party against whom summary judgment is sought. The burden of showing an absence of any material factual issue is on the moving party, and if undisputed evidentiary facts disclose competing material inferences as to which reasonable minds might disagree, the motion must be denied. Cali v. Eastern Airlines, Inc., 442 F.2d 65, 71 (2d Cir. 1971).

B. The existence of genuine issues of fact in the present case.

In the instant case it must be conceded that plaintiff's prima facie case contains several genuine issues of material fact. However, the district court found that there was one necessary element, common to all causes of action against the accounting defendants, which plaintiff could not

possibly prove; namely, that it (plaintiff Competitive Associates) had seen, or relied directly upon, the false and misleading financial statements certified by the accounting defendants. In the view of the district court plaintiff could not prevail at trial without such proof, and therefore the existence of other issues of fact was deemed irrelevant.

This is error on two levels. First, as a matter of law plaintiff Competitive Assoicates is not required to prove that it saw, or directly relied upon, the false and misleading financial statements. This is Point I above. Second, a genuine issue of fact does exist as to whether plaintiff saw, or directly relied upon, those statements. Thus the argument under this Point II is in the alternative; it assumes arguendo that which plaintiff strenuously disputes: i.e., that proof of direct reliance is necessary to plaintiff's causes of action.

There were at least three stages in the retention of Yamada by Competitive Associates: first, the investigation which was conducted primarily by Jerome Randolph; second, the approval given by the Board of Directors of Competitive Associates; third, the ratification voted by the shareholders of Competitive Associates. Thus plaintiff Competitive Associates saw the false and misleading finan-

cial Statements certified by the accounting defendants if Jerome Randolph, any director, any adviser to the board of directors, or any shareholder of Competitive Associates saw them. Of the several hundred people in this class any number may have seen the false statements.

Jerome Randolph of course is a central witness on this issue. He was not within the control of Competitive Associates at the time of the summary judgment motion; indeed, at that time Competitive Associates was suing him in the federal court in California. In addition to his being a hostile witness, Randolph's specific whereabouts were not known to Competitive Associates, although he apparently was residing in California.

The burden of proof on the summary judgment motion was on the moving parties, the accounting defendants, yet they made no attempt to depose Randolph in this action prior to the summary judgment motion. In lieu of such a deposition they offered an exhibit which purported to be testimony of Randolph before the SEC. As more fully discussed below, the exhibit was inadmissible and was accepted by the district court over strenuous objection by plaintiff (93a).

The failure of the accounting defendants to obtain any admissible statement from the central witness (Randolph) or any other person in the class which composed Competitive Associates was a fatal defect. The accounting

defendants not only failed to meet their burden, they offered no admissible evidence whatever. They submitted only an attorney's affidavit and a starkly excerpted transcript of inadmissible testimony. In such circumstances, plaintiff was under no obligation to depose Randolph or any other member of the class who might have seen or directly relied upon the financial statements. The district court found that plaintiff had failed to take necessary depositions or request time to do so (197a). It thereby implicitly, and erroneously, shifted the burden of proof.

C. The district court improperly made findings of contested fact and considered inadmissible evidence in doing so.

Between pages 7 and 9 of the decision below (194a-196a) the district court made findings of fact on contested issues, as if a trial had been conducted. This is error. A genuinely contested issue of fact may not be determined on summary judgment.

The impropriety of determining contested issues of fact on summary judgment is illuminated by assessing the quality and admissibility of the evidence upon which the determination is made. For instance, the district court found that the false and misleading financial statements were not seen by plaintiff until the SEC showed them to Randolph on May 10, 1971 (194a). This is a contested issue, and

although the decision does not recite the court's basis for this finding, it is apparent that it is supported only by Exhibit E to the affidavit of Michael Lesch, sworn to April 4, 1974 (137a). That exhibit purports to contain copies of excerpts of the testimony of Randolph before the SEC. Plaintiff objected to admission of those excerpts (93a). The court's implicit overruling of that objection was error for the following reasons:

(a) The exhibit was not authenticated. There was no testimony that Randolph had been sworn. There was no testimony that he had signed or corrected the transcript. There was no identification of the interrogator. There was no identification of the reporter, much less any evidence of his or her qualifications. These safe-guards are commonplace, but indispensable, under the Federal Rules of Civil Procedure.

(b) The exhibit was incomplete. Plaintiff pointed out, in its objection, the insidious nature of the excerpting (93a).

(c) The exhibit was hearsay. The statements in the exhibit were out-of-court statements, offered for the truth of their contents. No exception to the hearsay rule was applicable. Plaintiff was not present at the purported deposition to cross-examine Randolph.

Of course it is the lack of opportunity for cross-examination which is the most significant of these basic deficiencies. As part of its objection to this exhibit plaintiff pointed out a critical ambiguity in the purported testimony which would have required careful cross-examination (93a-94a).

In short, this Exhibit E, which is an inadmissible document of classic proportions, is the cornerstone, the only cornerstone, upon which summary judgment was built. Thus the district court not only determined a critical fact issue without according plaintiff the trial to which it is entitled, but also, it totally disregarded the rules of evidence, by accepting, and relying heavily upon, a patently inadmissible and unreliable document.

In Blum v. Campbell, 355 F.Supp. 1220 (DMd. 1972) the court, in deciding a summary judgment motion, refused to consider a hearsay, unauthenticated "deposition" similar to that relied upon by the district court in the present case.

> The original of such "deposition" has not been produced or filed with the Clerk. Instead, a copy of this curious document, 10 pages in length, was mailed to the Court. Although signed by the stenographer (who was apparently not a notary public), such copy has not been executed by the deponent nor by the notary public who administered the oath. There is no indication that the reading and signing

> of such deposition was waived. Even more surprising, the notary public present on this occasion appears to have been the plaintiff, Eugene Blum, himself. Furthermore, no other attorney appeared except for plaintiff's counsel, in whose office the "deposition" was taken.... Quite understandably, defendant Campbell objects strenuously to this Court's acceptance of this "deposition" as a part of the record in this case. In particular, it is argued that defendant Campbell was not represented at the "deposition," that the same subject matter as in this case was not then involved and that the same parties were not then involved. See Moore on Federal Practice, 2d Ed., Vol. 6, p. 2146. This Court concludes that the document in question cannot be accepted either as a deposition or as an affidavit properly receivable under Rule 56 in opposition to defendant Campbell's motion for summary judgment. (pp. 1227-1228).

In the present case, the excerpted testimony of Randolph must -- as the plaintiff insisted on the original motion -- be deleted from the record. This being done, the accounting defendants have offered no proof at all to foreclose the reliance issue; and plaintiff must be accorded at trial an opportunity to prove its reliance.

POINT III

THE ANTI-FRAUD SECTIONS OF THE 1933 AND 1934 ACTS REQUIRE ONLY THAT PLAINTIFF PROVE THE FRAUDULENT SCHEME TOUCHED ITS PURCHASES AND SALES OF SECURITIES AND RESULTED IN ITS INJURY

A. Requirement of a purchase or sale of securities under the 1933 and 1934 securities acts.

Section 10(b) of the 1934 Act, in relevant part, reads as follows:

> It shall be unlawful for any person,... to use or employ, in connection with the purchase or sale of any security ..., any manipulative or deceptive device or contrivance.... (emphasis added).

Similarly, section 17(a) of the 1933 Act, in relevant part, reads as follows:

> It shall be unlawful for any person in the offer or sale of any securities... (1) to employ any device, scheme, or artifice to defraud, or (2) to obtain money or property by means of any untrue statement of material fact or any omission to state a material fact necessary in order to make statements made, in the light of the circumstances under which they were made, not misleading, or (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser. (emphasis added).

Thus it is self-evident that these sections of the federal

securities laws are intended to apply only to situations where the fraud in some respect involves transactions in securities.

In the present case securities transactions were at the center of Yamada's fraudulent scheme; they were the pay-off and the purpose of the whole deception. With the knowing aid and participation of the accounting defendants, Yamada enticed investment advisory clients by falsely inflating the performance of his showcase investment partnership, Takara Partners. He thus created a reputation which attracted and deceived investors, one of whom was plaintiff Competitive Associates. In the final stage of the scheme Yamada caused the deceived investors to purchase unsuitable securities, the price of which Yamada manipulated for his own enrichment.

The indispensable element in this scheme, which the accounting defendants unlawfully facilitated, was the manipulation of securities prices and the sale of these securities to investors attracted by Yamada's false reputation and performance.

The finding of the district court that there was no connection between the fraudulent acts and omissions of the accounting defendants and the purchase or sale of secu-

rities was error. Those fraudulent acts and omissions in-fact caused plaintiff's actual losses on the purchase and sale of securities manipulated by Yamada.

Here again the district court determined a contested issue of fact without a trial. On page 13 of its decision (200a) it said:

> There is no indication that the accounting defendants' auditing and certification of the Takara Partners' financial statements were carried out in any way calculated to influence the investing public, or to have any such effect as contributing to the employment of Yamada as a portfolio manager for Competitive Associates.

The district court there made a fact finding on the intent of the conspirators (Yamada and the accounting defendants) and on their purposes in falsifying the financial statements, matters hotly contested in this action. Issues of conspiratorial intent and purpose are archtype fact issues. They can not be determined without a trial.

The district court opinion makes no mention of Superintendent of Insurance of the State of New York v. Bankers Life and Casualty Co., 404 U.S. 6 (1971), the leading case interpreting the phrase "in connection with the purchase or sale of any security" in §10(b) of the 1934 Act. There several people conspired to purchase control of a company with the company's own assets. The company itself was not a party to the securities transactions in its own stock by which the conspirators obtained control.

It neither bought securities from the defendant, nor sold securities to the defendant. Its damage was sustained not as a result of losses on securities transactions, but rather by virtue of the conspirators' misappropriation of its assets. The Supreme Court found the "in connection with" requirement satisfied by a wholly collateral securities transaction which the conspirators caused plaintiff to engage in for no other purpose than to change the form of the assets which the conspirators planned to misappropriate. The Court said:

> The crux of the present case is that Manhattan [plaintiff] suffered an injury as a result of deceptive practices touching its sale of securities as an investor. (p. 12).

In the present case the district court made no attempt to apply this guiding principle.

The facts in Bolger v. Laventhol, Krekstein, Horwath & Horwath, supra, in some respects are strikingly analogous to the present case, while in other respects they are different. The same false and misleading financial statements are the subject matter of both cases. In both cases the accounting defendants sought to avoid a trial by pre-trial motions for judgment on the ground that the fraudulent scheme did not involve the purchase or sale of a security by the plaintiffs.

However, there the similarity ends, for in Bolger the plaintiffs were the limited partners of Takara Partners, and they did not purchase or sell securities. The fraudulent scheme of Yamada and the accounting defendants was designed to cause them to retain their limited partnerships, not to purchase or sell securities. The district court therefore dismissed the count of the complaint based on §10(b) of the 1934 Act, but in doing so recited the applicable standard as follows:

> In order to satisfy the new "touch" test enunciated in Bankers Life, for determining if the "in connection with" requirement has been met, the securities transaction must have played some part in the overall fraudulent scheme. (CCH Fed. Sec. L. Rep. pg. 96,192).

Unlike Bolger, in the present case plaintiff Competitive Associates did purchase and sell securities. The fraudulent scheme was designed to use Competitive Associates as a dumping ground for unsuitable securities the prices of which were being manipulated by Yamada. Thus under the "touch" test of Bankers Life and Bolger the securities transactions by Competitive Associates "played some part" in the fraudulent scheme. The part that they played is an issue of fact for trial.

B. Connection with securities transactions unnecessary under common law counts.

In finding that the unlawful acts and omissions of the accounting defendants were not committed in connection with the purchase or sale of securities the district court did not distinguish between the counts based on the 1933 and 1934 Acts and the counts based on common law.

This seems to have been an oversight, for it is axiomatic that the subject matter of common law fraud and breach of fiduciary obligation is not limited to securities; indeed, it is limited only by the imagination of the con-man. Thus summary judgment could not be granted on the common law counts. This is so whether or not the deception in this case was "in connection with the purchase or sale of securities".

C. Connection with securities transactions unnecessary under Investment Advisers Act of 1940.

In addition to the common law counts, the district court seems to have overlooked the count of the complaint based on sections 206(1) and 206(2) of the Investment Advisers Act of 1940 (199a). Although generally analogous to §10(b) of the 1934 Act and §17 of the 1933 Act, these sections do not contain any requirement that the proscribed fraud be "in connection with the purchase or sale of secu-

rities". They require only that the fraud be committed by an investment adviser and that the victim be the adviser's client (or prospective client). In the present case defendants Yamada and Takara Asset Management Corp. were the adviser and plaintiff Competitive Associates was the client - victim. The accounting defendants participated with Yamada in the scheme to defraud clients and prospective clients, and thus under the Investment Advisers Act they share Yamada's liability, both as co-conspirators and as aidors and abettors.

In the Bolger case the court dismissed the count based on §10(b) of the 1934 Act because plaintiffs had not purchased or sold securities as a part of the fraudulent scheme. However, it sustained the count which is based upon the Investment Advisers Act and which involves the same facts as are present here.

CONCLUSION

In granting summary judgment in favor of the accounting defendants, the district court erred in three respects.

(a) It held that if permitted a trial plaintiff would be unable to prove causation-in-fact without proving it saw or relied directly upon the false and misleading

financial statements. This was a throw-back to the rejected concept of "reliance".

(b) It determined a contested issue of fact; namely, whether plaintiff saw the false and misleading financial statements. In addition, in aggravation of that error, it made the determination on the basis of inadmissible evidence.

(c) It incorrectly held that plaintiff's purchases and sales of securities were not touched by the fraudulent scheme. Here again a contested issue of fact was determined. As a corollary error, the district court held that the common law counts of the complaint, as well as the count under the Investment Advisors Act, were insufficient unless they arose in connection with the purchase or sale of a security.

Plaintiff-appellant Competitive Associates respectfully requests that the order and judgment granting the accounting defendants summary judgment be reversed.

Respectfully submitted,

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SERVICE OF 2 COPIES OF THE WITHIN

Brief for Appellant

IS HEREBY ADMITTED.

DATED: 10/28/74

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DATED: OCT 29 1974

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